REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 34 OF 2020

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE STANDARDS TRIBUNAL...............................RESPONDENT

AND

HARLEYS LIMITED..................................INTERESTED PARTY

EX PARTE APPLICANT: KENYA BUREAU OF STANDARDS

RULING

Introduction

1. The Kenya Bureau of Standards, which is the *ex parte* Applicant herein, was aggrieved by the decision made on 27th September 2019 by the Standards Tribunal (the Respondent herein), which allowed the Interested Party's Appeal in Standards Tribunal Appeal No. 5/2019. The Respondent's decision also set aside the *ex parte* Applicant's decision dated 6th June 2018, which condemned the Interested Party's consignment imported vide Certificate of Conformity No. S-2018/05/479416 as substandard. The *ex parte* Applicant accordingly filed an application by way of a Chamber summons dated 6th February 2020, seeking leave to quash the Respondent's decision of 27th September 2019, and that the said leave operates as stay of the said decision. The *ex parte* Applicant was subsequently granted leave by this Court to commence the instant judicial review proceedings, and the parties were directed to canvass the prayer on stay *inter partes*.

2. The *ex parte* Applicant subsequently filed its substantive Notice of Motion dated 13th February 2020, whereupon the Interested Party filed a Notice of Preliminary Objection dated 3rd March 2020. This Court directed that the said Preliminary Objection be heard and determined first, by way of written submissions. CM Advocates LLP, the advocates for the Interested Party, filed submissions dated 5th May 2020; while the *ex parte* Applicant's submissions dated 26th June 2020 were filed by Lilan and Koech Advocates. This ruling is on the said preliminary objection, and the arguments thereon by the respective parties and determination by this Court are presented in the following sections.

The Preliminary Objection

3. The grounds raised by the Interested Party in its Preliminary Objection are as follows:

> **a) The Judicial Review motion herewith, is fatally and incurably defective for failing to properly invoke the Hon. Court's jurisdiction, in as far as its seeks to Review the judgment of the Respondent Tribunal dated *27th September, 2019*; without exhausting an adequate avenue for remedy, in violation of *Section 9(2), Fair Administrative Actions Act, 2015* as read with *Rule 29, Standard Tribunal (Practice and Procedure) Rules, 2013* which expressly reserve the Hon. Standards Tribunal's power of review, "*of a decision of the Tribunal upon some ground other than discovery of such new and important matter or evidence as is referred to in paragraph (1), or the existence of a clerical or arithmetic mistake or error apparent on the face of the decision*": so that the ex-parte Applicant's Motion runs afoul the Judicial Review doctrine of exhaustion by to date (*well over five months*) failing to move the Hon. Tribunal as appropriate.**
>
> **b) The Judicial Review motion herewith, is fatally and incurably defective as no exceptional circumstances exist, indeed none has been pleaded, nor leave for exemption sought by the ex-parte Applicant, under the statutorily mandatory provisions of**

Section 9(4), Fair Administrative Actions Act, 2015.

c) The subject Application should therefore be dismissed *in limine* with costs.

4. The counsel for the Interested Party referred to various authorities that have clarified on the source of jurisdiction of a court being legislation or the Constitution, including that by the Supreme Court of Kenya in **S.K. Macharia and another vs Kenya Commercial Bank and 2 Others [2012] eKLR**, and submitted that section 9(2) of the Fair Administrative Action Act divests this Court from lawful jurisdiction on the matter presented before it. According to the Interested Party, the *ex parte* Applicant has failed to exhaust internal mechanisms availed under the Standards Act and Rule 30 of the Standards Tribunal (Procedure and Practice) Rules, 2012 for appeal or review, and all remedies available under such written law have to be first exhausted.

5. While citing the decision in **Owners of Shipping Vessel Lilian S V Caltex Oil (Kenya) Ltd C.A. 50 of 1989,** the counsel for the Interested Party urged the Court to down its tools for want of jurisdiction, and submitted that the Standards Tribunal is competent to consider the prayers and relief sought by the *ex parte* Applicant if at all they are merited.

6. The interested Party proffered other reasons why this Court should decline jurisdiction, and cited **R vs ODPP & 7 Others ex-parte Sylvia Wairimu Njuguna (2018) eKLR** for the position that judicial review proceedings differ from and should not be transformed to ordinary civil litigation. It was also urged that where the law has established a specialised forum to adjudicate over a particular dispute, then such forum must at first instance be exhausted before the High Court can assume jurisdiction over such a matter as observed by the Court of Appeal in **Speaker of the National Assembly vs James Njenga Karume (1992) eKLR**.

7. Various decisions on the doctrine of exhaustion were also cited by the Interested Party, including **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others, (2015) eKLR** and **The Matter of the Mui Coal Basin Local Community (2015) eKLR .** The Interested Party also submitted that the *ex-parte* Applicant cannot demand to be heard through these proceedings as its application isn't justified. Reliance was in this regard placed on the Court of Appeal decision **in Muchanga Investments limited vs Safaris Unlimited (Africa) Ltd 2 Others (2009) KLR** for the position that litigants are only entitled to as much of the Judge's time as is necessary for the proper determination of the relevant issues.

8. Lastly, the Interested Party relied on the decision in **R vs PPARB ex-parte Symphony Technologies Ltd (K) & 2 Others, [2016] eKLR** for the submission that a successful party should be be allowed to enjoy the fruits of their labor, therefore the instant application should be dismissed and the costs follow the event.

The *ex parte* Applicant's Reply

9. The *ex parte* Applicant submitted in response that the body whose decision is under scrutiny in the instant case is the Standards Tribunal which is established by the Standards Act by section 16A of the Act. The *ex parte* Applicant referred to the Tribunal's powers in section 16C of the Act, and its case is that the Respondent acted *ultra-vires*. Reliance was placed on the holding in **Anisminic vs Foreign Compensation Committee [1969] 2 AC 147** as cited in **Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others [2013] eKLR,** that a decision made by a body acting in excess of its jurisdiction is no determination at all.

10. On the Interested Party's reliance on section 9 (2) of the Fair Administrative Actions Act to oust the jurisdiction of the court, and its reference to two unexhausted remedies of review and appeal, the *ex parte* Applicant reiterated that where a tribunal acts in excess of its jurisdiction, its actions become automatically null and void as explained in **Macfoy vs United Africa Co. Ltd [1961] 3 All E.R. 1169**. Therefore, that the *ex parte* Applicant herein is calling upon this court to cure a fatal defect caused by the Respondent's abrogation of a space and powers not conferred upon it, which was the power to declare the conformity or non-conformity of samples tested by the Applicant, which is the Applicant's sole statutory mandate by virtue of Section 4(i) of the Standards Act.

11. Lastly, the *ex parte* Applicant submitted that the High Court has jurisdiction to supervise the manner in which subordinate courts and tribunals carry out their duties, and cited the decision in **Joyce Cherop Kaspandoy & 609 others v Kenya Power and Lighting Company (2019) eKLR**, that courts ought to develop the concept of judicial review in Kenya as a constitutional supervision of power. Further, that this supervision is an external exercise and better declared by a superior court, and the issue at hand therefore does not revolve around the actual exercise and disposition of the Tribunal's mandate.

The Determination

12. I have carefully considered the arguments made by the Interested Party and the *ex parte* Applicant. The first question that this Court needs to answer is whether the grounds raised in the Interested Party's preliminary objection raise pure points of law. It is only after determining this question, that this Court can proceed to answer the secondary question as to whether the said preliminary objection has merit and should be upheld.

13. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

> ***"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

14. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to

proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

15. It is in this respect evident that from the submissions made by the parties that the main ground raised by the Interested Party is that this Court is divested of jurisdiction by the provisions on alternative dispute resolution in the Standards Act, and particularly in Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013 made thereunder. A Court's jurisdiction flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent. It is thus clearly a pure question of law.

16. I am in this respect guided by the case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

> **"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

17. The Court of Appeal proceeded to define jurisdiction and its source as follows:

> "**By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"**

18. In order to determine whether the Interested Party's preliminary objection on this Court's jurisdiction is merited, it is important and necessary to clarify the dispute that is before this Court at the outset, and whether this Court has or does not have jurisdiction in relation thereto**.** It is not in dispute in this regard that the *ex parte* Applicant has commenced judicial review proceedings to quash the decision made on 27th September 2019 by the Respondent Tribunal.

19. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

20. It is notable that in the present proceedings, this Court is being asked in exercise its supervisory jurisdiction, to review the lawfulness of the proceedings and decision of the Respondent Tribunal, which is established under the Standards Act. The Respondent is therefore both a statutory quasi –judicial body, and a subordinate court within the meaning of Article 169(1)d of the Constitution, and amenable to this Court's supervisory jurisdiction,.

21. Coming to the arguments made by the Interested Party, it is the position that the exhaustion of alternative remedies is now a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution obliges this Court to observe the principle of alternative dispute resolution. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

> **"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

22. The Court of Appeal first embodied the doctrine of exhaustion in **Speaker of National Assembly vs Karume (1992) KLR 21,** and further clarified the doctrine under the current constitutional dispensation in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

> "**It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial**

consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

23. Coming to the present application, Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013 in this regard provides as follows on review of the Respondent Tribunal's decision:

> **"29. (1) Any person aggrieved by a decision of the Tribunal from which an appeal is allowed, but from which no appeal has been preferred and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decision was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decision may apply for a review of judgment to the Tribunal without unreasonable delay.**
>
> **(2) A party who is not appealing the decision of the Tribunal may apply for a review of the decision notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the High Court the case on which he applied for the review.**
>
> **(3) An application for review of a decision of the Tribunal upon some ground other than discovery of such new and important matter or evidence as is referred to in paragraph (1), or the existence of a clerical or arithmetic mistake or error apparent on the face of the decision, shall be made in Form ST 7. as set out in the First Schedule.**
>
> **(4) Where it appears to the Tribunal that there is no sufficient ground for a review, it shall dismiss the application.**
>
> **(5) Where the Tribunal is of the opinion that the application for review should be granted, it shall grant the same, provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decision was passed or made without strict proof of such allegation.**
>
> **(6) The applicant shall within fourteen days of filing the application serve the application for review and the supporting documents on all the parties to the application.**
>
> **(7) A party served under paragraph (6) has fourteen days from the date of service of the application to file and serve a statement of response.**
>
> **(8) The statement of response under paragraph (7) shall be in Form ST 8 as set out in the First Schedule**
>
> **(9) When the application for review is granted, the Tribunal shall make such order in regard to the review as it thinks fit.**
>
> **(10) No application to review a decision made on an application for a review of a decision shall be entertained."**

2. An ordinary reading and interpretation of the said provisions, and particularly from the use of the words and phrase in Rule 29 that a person "may apply for review of the decision", shows that that an application for a review of the Tribunal's decision is not mandatory. In addition, the said provisions apply where a matter is appealable, but no appeal has been proffered, and it is evident that the provisions apply where what is sought is a review of the substance of a decision made by the Respondent Tribunal on account of new evidence, a mistake or error on the face of the record or any other sufficient reason.

3. This is review is therefore distinct and its purpose is different from the review undertaken by this Court as explained in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR. The Court of Appeal emphasised in that case that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of an administrative body.**

24. It is also acknowledged that the Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. This discretion is exercised pursuant to the provisions of section 9(4) of the Fair Administrative Action Act.

25. The approach to be taken by the Courts in this regard was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows*:*

> **".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."**

26. In considering whether an alternative remedy is applicable and ought to have been exhausted by an Applicant, the Court considers a number of factors. The first is the adequacy of the alternative remedy as a matter of substance, in that the alternative remedy should be

convenient, expeditious and effective in practical terms, and the procedure employed should provide the claimant with the outcome sought as a matter of substance.

27. The second consideration is the availability of the alternative remedy. Thus, in the case of **Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96**, the African Commission of People and Human Rights held that:

> **"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."**

28. The last consideration is the nature of the challenge before the Court. If the challenge raises a factual dispute, judicial review is normally not the appropriate procedure, and the alternative remedy might be better suited to hear the dispute. On the other hand, a claim may raise a point of law of general importance, which in the public interest ought to be definitively determined by a court of law, despite of the existence of an alternative dispute resolution mechanism.

29. The *ex parte* Applicant has in this respect urged that the contestation in the instant application is the jurisdiction of the Respondent's Tribunal to decide the dispute that was before it, and the said decision cannot therefore be subject of the substantive review provisions in Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013. This is an issue of law that this Court has jurisdiction to determine, and which in my view is beyond the purview of the provisions of Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013. As held by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR:**

> **Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."**

30. To this extent the alternative procedure in Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013 is not only inadequate, but also inappropriate to determine the dispute between the parties in the instant application.

The Orders

31. Arising from the foregoing reasons, this Court finds that the *ex parte* Applicant's Notice of Motion dated 13th February 2020 is competently and properly brought before this Court. This Court accordingly orders as follows:

> **I. The Interested Party's Preliminary Objection dated 3rd March 2020 is not merited, and is hereby dismissed with no order as to costs**
>
> **II. In light of the time that has elapsed since the Respondents decision since 27th September 2019, and to expedite the hearing of this matter, prayer 2 (b) in the *ex parte* Applicant's Chamber Summons dated 6th February 2020 that the leave granted by the Court operates as stay of the decision by the Respondent of 27th September 2019 that is pending *inter partes* hearing, is hereby dispensed with on the terms that the *ex parte* Applicant's substantive Notice of Motion dated 13th February 2020 shall instead proceed to full hearing.**
>
> **III. The costs of the Chamber Summons dated 6th February 2020 shall be in the cause.**
>
> **IV. The Respondent and Interested Party shall file and serve their responses to the *ex parte* Applicant's Notice of Motion dated 13th February 2020 within thirty (30) days of the date of this ruling.**
>
> **V. Upon service of the Respondent's and Interested Party's responses, or default thereof the *ex parte* Applicant shall file and serve the Respondent and Interested Party with submissions on the Notice of Motion dated 13th February 2020, within fourteen (14) days.**
>
> **VI. The Respondent and Interested Party shall be required to file their reply submissions within fourteen (14) days from the date of service of the *ex parte* Applicant's submissions.**
>
> **VII. This matter shall be mentioned on 14th December 2020 to confirm compliance and reserve a judgment date.**
>
> **VIII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**
>
> **IX. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and shall send copies thereof by electronic mail to the Deputy Registrar of the Judicial Review Division at**

judicialreview48@gmail.com and asunachristine51@gmail.com.

X. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 14th December 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant, Respondent and Interested Party by electronic mail by close of business on Monday, 12th October 2020.

XIV. Parties shall be at liberty to apply.

32. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5th DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE